

LEONG POH SHEE v. NG KAT CHONG

[O.C.J. (Raja Azlan Shah J.) October 22, 1965]

[K.L. — Civil Suit No. 239 of 1965]

Practice and Procedure — Judgment — Application for stay of execution.

The defendant had agreed to sell a portion of his land to the plaintiff. The plaintiff had paid the full purchase price but the defendant had not transferred the property. The plaintiff issued a writ for transfer of the property and on the defendant's failure to enter appearance obtained judgment against him. The defendant applied for stay of execution or in the alternative to set aside the judgment.

Held: (1) although the court has an unqualified discretion to grant a stay of execution it has never been the practice to do so unless it is supported by an affidavit of special circumstances and as no such special circumstances had been shown in this case the application for stay must be dismissed;

(2) in order to set aside a judgment obtained regularly there must be an affidavit of merits and as in this case the defendant had no defence on the merits, the application to set aside the judgment must also be dismissed.

Cases referred to:—

- (1) *Evans v. Bartlam* [1937] A.C. 473.
- (2) *Leong Han v. Kuppusamy* [1959] M.L.J. 95.
- (3) *South British Insurance Co. Ltd. v. Haji Ismail* [1964] M.L.J. 16.
- (4) *Chinese Tin Mines Rehabilitation Loans Board v. Chee Hoi Voon* [1959] M.L.J. 152.

CIVIL SUIT.

T. K. Tang for the plaintiff.

K. L. Devaser for the defendant.

Raja Azlan Shah J.: This is a motion by the defendant for stay of execution for a period of three years of the judgment of Abdul Aziz J. given on 23rd August, 1965; in the alternative, to set aside that judgment and that the defendant be permitted to defend the suit.

The defendant is a registered proprietor of the land held under Certificate of Title No. 15123, Lot 96, section 48, in the town and district of Kuala Lumpur containing an area of approximately 254,553 square feet. By virtue of an agreement dated 8th January, 1958, made between the plaintiff and the defendant, it was agreed that the defendant should sell and the plaintiff should purchase for the sum of \$7,700 a portion of the said land approximately 3,600 square feet together with the house erected thereon bearing No. 2K, Jalan Kolam Ayer.

In compliance with that agreement, the plaintiff has paid a deposit of \$6,000 in respect of the purchase price on the date of the agreement, and it was agreed that the balance of \$1,700 shall be paid by the plaintiff to the defendant when the latter is ready to deliver the document of title of the said portion of land. On or about 12th August, 1964, the plaintiff, at the request of the defendant, paid the balance of

A \$1,700 and a receipt was given. The defendant, having received the full purchase price, has neglected and refused and continues to neglect and refuse to transfer the said portion of land to the plaintiff. On 5th March, 1965, the plaintiff issued a writ against the defendant praying for transfer of the said land and in default of his doing so the Senior Assistant Registrar, High Court, Kuala Lumpur, to execute such transfer in favour of the plaintiff.

On 12th July, 1965, the plaintiff took out a summons in chambers for leave to sign final judgment against the defendant. He swore an affidavit dated 3rd July, 1965, in which he stated that the writ has been duly served on the defendant on or about 27th May, 1965, but that the defendant did not enter an appearance. The case came for trial before Abdul Aziz J. on 16th August, 1965. Both their counsel appeared, and by consent it was adjourned to 23rd August, 1965, on which date judgment by default was given in favour of the plaintiff as claimed. It is against that order that the defendant now applies for stay of execution, in the alternative, to set it aside with liberty to defend the suit.

Although the court has an unqualified discretion to grant a stay it has never been the practice to do so unless it is supported by an affidavit of special circumstances. The law on the point is well settled. I quote a passage from *Halsbury's Laws of England*, 3rd Edition, Volume 16, paragraph 51 at page 35:—

"The court has an absolute and unfettered discretion as to the granting or refusing a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant it if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing".

I would also adopt a passage in *Mallal's Supreme Court Practice* at page 573 where the learned author said:

"A stay will not be allowed unless there are special circumstances".

The substantial question now to be posed, as I see it, is whether the allegation that the land office might take three years to sub-divide the land in question affords special circumstances for a stay. Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common. For the land office to sub-divide a piece of land is common or usual. For it to do so for a period of one, two or three years is usual or common. It is nothing distinctive or out of the way and therefore, to my mind, that by itself does not constitute special circumstances to persuade the court to stay the execution.

Coming to the second limb of the defendant's

prayer, it is settled law that in order to set aside a judgment obtained regularly, there must be an affidavit of merits. *Evans v. Bartlam* ⁽¹⁾ is usually referred to as supplying the governing rule in this context. It is at any rate a decision explicitly arising out of a judgment by default. That case was followed by Smith J. in *Leong Han v. Kuppusamy* ⁽²⁾ and by Hepworth J. in *The South British Insurance Co. Ltd. v. Haji Ismail* ⁽³⁾ and referred to by Good J. in *The Chinese Tin Mines Rehabilitation Loans Board v. Chee Hoi Voon*. ⁽⁴⁾

Insofar as the defendant did not enter appearance and in consequence the plaintiff was entitled to judgment by default as prayed, the judgment was obtained regularly. What he has to establish now is whether he has adduced evidence that he has a *prima facie* defence.

In his affidavit, the defendant deposed that on 20th May, 1965, he requested the plaintiff's solicitor to grant him a period of three years to complete the sub-division of the said land so that he could obtain a separate title for the portion sold to the plaintiff. The said solicitor agreed, and he accordingly did not appear nor did he file his defence. In reply, the plaintiff affirmed that that was not true. He deposed that the defendant offered to purchase the said land at double the price which he did not agree, and he accordingly instructed his solicitor to prosecute the case. The plaintiff has paid all the purchase price under the agreement; he has therefore fulfilled his part of the bargain. It is now for the defendant to complete his part of the bargain by transferring the said land to the plaintiff. In the circumstances, has he a good defence on the merits? The defendant has done nothing constructive to have the land sub-divided since 1958. In fact, he admitted all this but prays for time to sub-divide the land since he averred that time is not of the essence of the contract. I am satisfied that he has no defence on the merits.

The motion is therefore dismissed with costs.

Motion dismissed.

Solicitors: *M. N. Cumarasami & Co.; K. L. Devaser & Co.*

LIEW YU FATT v. TECK GUAN & CO. LTD.

[O.C.J. (McGilligan J.) November 17, 1965]

[Jesselton — Civil Suit No. 44 of 1965]

Damages — Compensation for alleged loss of use of log pond — Trespass — Costs.

In this case it appeared from the facts that the defendants had been granted a temporary occupation licence of land for the purpose of building a log pond for storing timber. In building their log ponds they went beyond the area held by them under the licence and on to land which was subsequently given to the plaintiff

on a temporary occupation licence. The plaintiff claimed damages (a) for compensation for the alleged loss of the use of the log pond, such loss being caused by the defendant's unlawful occupation of the log pond; alternatively (b) for damages for trespass.

Held: (1) there could be no claim for contract or quasi-contract in this case as the occupation of the log pond by the defendants was unlawful and without the permission of the plaintiff;

(2) the plaintiff was entitled to damages for trespass but as he had grossly inflated and exaggerated his claim for damages, he would not be awarded costs.

Cases referred to:—

(1) *Cheong Kee Teck v. Quah Hoay Kwan & Others* [1964] M.L.J. 224 at p. 231.

(2) *Whitwham v. Westminster Brymbo Coal and Coke & Co.* [1896] 2 Ch.D. 538 at p. 541.

CIVIL SUIT.

V. Kumar for the plaintiff.

J. Trelaven for the defendants.

Cur. Adv. Vult.

McGilligan J.: The plaintiff's claim is based on an allegation of unlawful use and occupation by the defendants of what he says is his log pond at an area by the sea known as Tanjong Batu; this area is 2 or 3 miles from Tawau Town.

A log pond is a fenced-in portion of the sea, the sea-shore being one of its sides, and its other 3 sides being formed largely by lines of piles, i.e., heavy wooden stakes driven into the sea-bed. The main use of a log pond is for the storage of cut timber waiting to be loaded on to an exporting ship.

At Tanjong Batu there is a large piece of land fronting the sea, which is held on lease (P.L. No. 16148) by Mr. Hong Teck Guan, one of the directors of the defendant company. On the sea side of this piece of land there are two log ponds, as may be seen from the plan, Exhibit P.18. The court inspected the area, and the plan is accepted as being correct in every detail. The larger, more northerly, pond I shall call the large pond, and the smaller, more southerly, the small log pond.

The history of these ponds (and I am now making findings of fact) is this: On the 9th day of June the defendants were granted a temporary occupation licence over 800 feet (along the shore) by 400 feet (out to sea) at Tanjong Batu. On the 10th of November 1962 they were granted an extension of 200 feet (along the shore) by 400 feet out to sea, and the rent payable was increased to \$200 a month. In 1961 and 1962 the defendants at the site held under temporary occupation licence by them fenced in an area of about 787 feet (along the shore) by between 800 and 1000 feet (out to sea) (This latter length I take from the statement of Mr. Hong Seng Ho, general manager of the defendant company, and from the plaintiff's evidence).